BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PATRICIA BURBANK	)	
Claimant	)	
	)	
VS.	)	Docket No. **1,035,451**
	)	
PRICE CHOPPER	)	
Self-Insured Respondent	)	

ORDER

Claimant requests review of the March 13, 2008 preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh.

ISSUES

The claimant alleged she suffered a series of work-related repetitive injuries to her back from November 10, 2005 through her last day worked on January 28, 2007. The Administrative Law Judge (ALJ) found claimant did not sustain her burden of proof that her injury arose out of and in the course of employment or that she provided timely notice of her injury.

Claimant requests review and argues that she provided timely notice of her injuries and that she met her burden of proof to establish that her repetitive work activities aggravated a preexisting degenerative condition in her low back.

Respondent requests the Board to affirm the ALJ's Order. Respondent notes claimant's last day of work was January 28, 2007, and she did not provide notice of a work-related injury until July 6, 2007. Consequently, respondent argues she did not provide timely notice. Respondent further argues that claimant never recovered from back surgery in 2002 and her current complaints are the natural and probable consequence of that preexisting condition.

The issues on this appeal from a preliminary hearing are whether claimant suffered a compensable work-related injury and whether she provided timely notice of her injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Claimant was hired as a cashier for respondent on March 13, 1991. Her duties involved standing behind a counter, ringing up the groceries on the cash register and then turning and putting the items into sacks for customers. Claimant also would place price tags on the shelves. This job involved repetitive lifting and twisting activities.

In October 2002, claimant suffered a back injury lifting a granddaughter. Ultimately, surgery was performed on claimant's back by Dr. Wesley E. Griffitt on December 2, 2002. Claimant was off work until February 6, 2003, and then she returned to work without restrictions doing her cashier job. The following year, 2004, claimant sought medical treatment twice with a chiropractor for aches and pains in her back. Claimant testified she had back pain off and on. When she later began receiving treatment for her back the history she provided regarding whether the surgery improved her back pain was inconsistent.

Claimant also had open heart surgery on June 14, 2005, and was off work for approximately five months. Claimant was released to return to work without restrictions on November 10, 2005. When claimant returned to her cashier work she began to have back pain. Although she mentioned her pain to her supervisor, she agreed that she did not state it was due to an injury at work as she believed a work-related injury had to be caused by a single traumatic event.

Claimant did seek medical treatment for her back pain starting on February 1, 2006, when she was seen by Dr. John Hornback and complained of low back pain. On March 27, 2006, she continued to complain of back pain when she saw Dr. Ram Belakere and physical therapy was recommended but claimant could not afford to follow through with the recommended treatment.

Claimant was examined and evaluated by Dr. Douglas Burton on June 20, 2006. The doctor noted: "She states that she really did not get any better after this surgery and has continued to have, at times, quite severe pain. She works at Price Chopper as a cashier and basically stands for eight to nine hours per day and says this exacerbates her pain considerably."[1] Dr. Burton diagnosed claimant as having low back pain with referred pain in the legs and multi-level degenerative disk disease. The doctor recommended an MRI followed by physical therapy. On July 18, 2006, Dr. Burton advised against further surgery but recommended physical therapy. Claimant was again unable to follow through with this recommendation.

On October 17, 2006, Dr. K. Dean Reeves performed trigger point injections which claimant indicated provided temporary relief followed by worsening pain. On December 28, 2007, claimant was examined and evaluated by Dr. S. R. Katta. The doctor diagnosed claimant with chronic lower back pain with lumbar radiculitis and no clinical evidence of

[1] Burbank Depo. (Nov. 8, 2007), Ex. 5 at 2.

lumbar radiculopathy. Dr. Katta recommended a home program which consisted of moist heat, trigger point massage and stretching exercises for her low back. The pain continued so the doctor recommended physical therapy which claimant said that she could not afford. On January 25, 2007, Dr. Katta advised claimant to continue her home exercise program and also participate in water aerobics. January 28, 2007 was the last day claimant worked. On February 5, 2007, claimant was referred by Dr. Katta to the pain clinic for epidural steroid injections of which claimant only received one.

When claimant left work in January 2007 she began drawing union benefits and noted on the claim form that her condition was not work-related. However, she later began marking on the claim form that her condition was work-related after she read Dr. Koprivica's report which indicated her condition was caused by her work activities.

At claimant's attorney's request, Dr. Koprivica examined and evaluated the claimant on June 15, 2007. Dr. Koprivica opined: "that Ms. Burbank's work activities as a cashier have permanently aggravated and accelerated her preexistent multi-level lumbar spondylosis, resulting in progression of disease to the point that she has the disabling symptomatic multi-level stenosis."[2] The doctor further opined that claimant was temporarily and totally disabled since her last date of work on January 28, 2007. He recommended conservative treatment.

On August 17, 2007, claimant was examined and evaluated by Dr. Alexander S. Bailey at respondent's attorney's request. The doctor diagnosed claimant as having multi-level lumbar spondylosis; degenerative disk disease; arthrosis; multi-level associated spinal stenosis; and possible systemic arthritic condition. Dr. Bailey did not find any evidence that her employment exacerbated, progressed, accelerated, or had any bearing on the claimant's current condition.

The ALJ determined claimant failed to provide timely notice of her accident. The first step in the determination of whether timely notice was provided is to determine the date of accident.

K.S.A. 2007 Supp. 44-508(d) was amended by the Kansas legislature effective July 1, 2005. The definition of accident has been modified, with the date of accident in microtrauma cases being now defined by statute rather than by case law. The new date of accident determination is as follows:

> 'Accident' means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner

[2] Burbank Depo. (Nov. 8, 2007), Ex. 10 at 12.

> designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. **In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing.** Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.[3] (Emphasis added.)

K.S.A. 2007 Supp. 44-508(d) offers a series of possible "accident dates" for a repetitive trauma injury dependent upon a case-by-case determination of which of the alternative factual situations established by statute have occurred.

The ALJ relied upon a Board decision in *Hinojos*[4] to conclude that the accident date under the statute could not be later than the last day worked. However, in view of recent Supreme Court determinations regarding strict construction of statutes, a majority of Board members have now concluded that the plain language of the statute does not prevent finding an accident date after the last day worked.

When dealing with injuries that are caused by overuse or repetitive microtrauma, it can be difficult to determine the injury's date of commencement and conclusion. However, the date of accident dispute traditionally hinges upon situations where claimants have undergone microtrauma injuries over a period of days, weeks or months, with the determination of the date of accident being a legal fiction, rather than a specific traumatic event.

Case law established the legal fiction of a single accident date in order to determine what law would apply to the claim, as well as whether timely notice or written claim was provided. But this does not mean that the injury, in fact, occurred on only one day. Under the statute, a claimant can receive medical treatment before the date of accident, as

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[3] K.S.A. 2007 Supp. 44-508(d).

[4] *Hinojos v. Cargill Meat Solutions Corp.*, No. 1,031,245 2007 WL 1041060 (Kan. WCAB Mar. 30, 2007).

treatment may be undertaken well in advance of claimant receiving written notice that the condition is "diagnosed as work related." Again, a single date of accident for a repetitive trauma injury is simply a legal fiction. And the fact that the date may be after the last day worked or the employment relationship terminated is not prohibited by the statute. To the contrary, the only prohibition is against the date of accident being the date of or the day before the date of the regular hearing.

In the instant case, claimant was never restricted nor taken off work by an authorized physician. Absent those facts, the next possible accident date is the earliest of either the date of claimant's receipt in writing of notification that her condition was diagnosed as work related or the date she gave written notice of the injury to the employer. There is evidence claimant's attorney received written notification from claimant's physician that claimant's condition was diagnosed as work related and that when claimant read that report notice was provided respondent that same day. Consequently, under the plain language of the statute, claimant's date of accident is July 6, 2007, and notice was timely for the series of microtraumas occurring through her last day worked.

This Board member finds that claimant, as is the case with many unsophisticated workers, was unaware that she was suffering a series of injuries each and every day she continued working. After her surgery in 2002 she returned to work for about two years without seeking significant treatment for her back, she then had heart surgery and upon her return to work started to again develop worsening back pain. Claimant did tell her supervisor that her back was bothering her but did not at that time realize her condition was work related as she began to seek treatment for her worsening back condition.

Claimant testified that her back would bother her from time to time after the 2002 surgery but did not become constantly painful until she returned to work after her heart surgery. Dr. Koprivica opined that claimant's work activities had aggravated her preexisting degenerative back condition. Conversely, the medical records from Drs. Burton and Reeves contain histories taken from claimant that her back condition never improved after her surgery in 2002 and Dr. Bailey opined, in substance, that claimant's current condition was a natural progression of her underlying degenerative disk condition and unrelated to her work activities.

It appears that after her back surgery in 2002, claimant may have had occasional back pain but she was able to work without significant medical treatment until her 2005 heart surgery. However, after she returned to work following her heart surgery she began to have worsening back pain and sought medical treatment on an increasingly frequent basis. Claimant told the doctors that standing and performing her work activities worsened the pain.

It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the

affliction.[5] The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.[6] Dr. Koprivica concluded that claimant's work activities aggravated and accelerated her preexisting multi-level lumbar spondylosis. This Board Member finds claimant has met her burden of proof to establish that she suffered repetitive work-related injuries arising out of and in the course of her employment.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[7] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[8]

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated March 13, 2008, is reversed and case remanded for further proceedings in accordance with the foregoing determination that claimant provided timely notice and suffered a compensable injury.

IT IS SO ORDERED.

Dated this 30th day of June 2008.

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HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: C. Frank Allison Jr., Attorney for Claimant
Timothy G. Lutz, Attorney for Respondent
Kenneth J. Hursh, Administrative Law Judge

[5] *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984)*; Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

[6] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp*., 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

[7] K.S.A. 44-534a.

[8] K.S.A. 2007 Supp. 44-555c(k).